97-SBE-006-A

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 95R-1085
William Tierney	)	
	)	

Representing the Parties:

For Appellant:	William Tierney
For Respondent:	Ann C. Hoover, Counsel Karen D. Smith, Counsel
Counsel for Board of Equalization:	Derick J. Brannan, Tax Counsel

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition filed May 12, 1996, by respondent, Franchise Tax Board, for a rehearing of appellant's appeal from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof.

Accordingly, it is hereby ordered that the petition be and the same is hereby denied and that our order of April 10, 1997, be and the same is hereby affirmed.

After further consideration of our original opinion in this matter and respondent's petition, it is further ordered that our opinion in this case dated April 10, 1997, is withdrawn. The following opinion shall be given in its place:

O P I N I O N

This appeal was originally filed as an appeal from a proposed assessment pursuant to Revenue and Taxation Code section 19045. However, appellant paid the amount of tax due while the appeal was pending, and pursuant to Revenue and Taxation Code sections 19335 and 19324, subdivision (a), the appeal will be treated as an appeal from the action of the Franchise Tax Board in denying the claim of William Tierney for a refund of personal income tax in the amount of $761 for the year 1992.

Appellant filed his 1992 personal income tax return and claimed head of household filing status. Respondent disputed appellant's qualifications for that status. The sole legal issue concerns whether appellant may include the time during which he and his ex-spouse occupied the same household for purposes of determining whether appellant's household was his children's principal place of abode for more than one-half of the 1992 taxable year.

The relevant facts of the case were not disputed by the respondent, and therefore, we will provide only the salient facts in this opinion. Appellant and his ex-spouse separated sometime in March of 1992, and divorced on October 5, 1992.[1] Appellant lived in his own home and paid more than one half of the expenses of maintaining that home during all of 1992. Appellant paid more than one half of the support for his two children, and both children lived with him in 1992 from January through March, in June and July, and from October 5th through the end of the year. Appellant, his ex-spouse and the two children lived together for the three month period between January and March of 1992; appellant's ex-wife did not live with him at any time during the remainder of the year.

California Revenue and Taxation Code section 17042 sets forth the definition of head of household by reference to Internal Revenue Code sections 2(b) and 2(c).[2] The relevant portions of section 2(b) provide as follows:

> "(1) **In general.** For purposes of this subtitle, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, ... and ...
>
> "(A) maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of --
>
> "(i) [an unmarried] son, stepson, daughter, or stepdaughter of the taxpayer, ...
>
> * * *

[1]To our knowledge, the appellant's ex-spouse was still alive at the end of the tax year, and therefore, appellant was not a surviving spouse as envisioned by Internal Revenue Code sections 2(b)(1) and 2(a).

[2]Unless otherwise specified, all section references are to sections of the United Stated Internal Revenue Code as in effect for the year in issue.

> "For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual."

(I.R.C. § 2(b)(1).) For purposes of the instant case, the only issue is whether appellant's household constituted the principal place of abode for his children for more than one half of the 1992 taxable year.[3]

The "principal place of abode must be construed to mean the one place of abode most important to the qualifying individual[s], relegating any other abode to secondary rank." (Appeal of John William Branum, Cal. St. Bd. of Equal., Aug. 16, 1979.) "The principal place of abode is determined by the physical occupancy test, which requires that the qualifying dependent live in the taxpayer's home." (Appeal of Barbara J. Walls, Cal. St. Bd. of Equal., Apr. 6, 1978.) When "significant amounts of time are spent by the qualifying individual in two different households, the place where the greater amount of time was spent is considered the principal place of abode." (Appeal of Ronald C. White, Cal. St. Bd. of Equal., Feb. 5, 1985.)

Appellant contends that his home was the children's principal place of abode for eight months, including the first three months of 1992 (before his separation), then for two months in the summer, and finally, the last three months of 1992. Respondent argues that appellant is not entitled to credit for the first three months of 1992 in determining the period during which appellant's home was the children's principal place of abode. Unfortunately, while the previously mentioned statute and case authority provide some framework for our discussion, they do not directly address the issue raised by this case. In fact, neither party has provided any persuasive legal authority for its position.[4] For that reason, we must treat this case as one of first impression and fashion a decision based on existing law and common sense.

According to respondent the purpose of the head of household status is to allow some tax relief to a single parent maintaining a household for his or her children. Respondent argues that this purpose is not served if the Board grants credit to appellant for any time in which he, the ex-spouse and the children reside in the same household. Unfortunately, respondent cannot identify any language in the statute which addresses the ex-spouse's living arrangements or which links those arrangements with the principal place of abode for the qualifying individual(s).[5]

In support of its argument, respondent offered a portion of the legislative history at the hearing. Because the purpose behind a statute is critical to its proper interpretation, and because we

---

[3]We note that both children apparently lived with the appellant for the same time periods and therefore refer to them jointly; however, we do not mean to imply that all of appellant's children must live with him in order to qualify for head of household filing status under the statute.

[4]We note that respondent relies exclusively on its own legal summary as authority for its position in this case. Unfortunately, the relevant portion of that summary, section 10, sets forth a statement of law without any corresponding legal support. Such unsupported statements of law are not appropriate for purposes of a formal administrative appeal.

[5]In fact, the only requirement involving the ex-spouse set forth in section 2 is the requirement that the taxpayer cannot be married to the ex-spouse at the end of the taxable year.

rely in part on the history provided by the respondent, we set forth a lengthy portion of respondent's submission.

> "3. Reasons for adopting the head-of-household provision.
>
> "It is believed that taxpayers, not having spouses but nevertheless required to maintain a household for the benefit of other individuals, are in a somewhat similar position to married couples who, because they may share their income, are treated under present law substantially as if they were two single individuals each with half of the total income of the couple. The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting. The hardship appears particularly severe in the case of the individual with children to raise who, upon the death of his spouse, finds himself in the position not only of being denied the spouse's aid in raising the children, but under present law also may find his tax load heavier.
>
> "However, it was not deemed appropriate to give a head of household the full benefits of income splitting because it appears unlikely that there is as much sharing of income in these cases as between spouses. In the case of savings, for example, it appears unlikely that this income will be shared by a widow or widower with his child to the same extent as in the case of spouses. As a result only one-half of the benefits of income splitting are granted to heads of households."

(1951 U.S. Code Cong. & Admin. News, at pp. 1790-1791.) Respondent argues that the legislative purpose focuses on taxpayers who must raise their children without a spouse, such as the case of a taxpayer whose spouse has died.

While respondent's argument is not without some merit, it ignores the "income sharing" portion of the above statement of legislative purpose. In the instant case, appellant shared his income with his children to the extent that he provided more than half of their support during the calendar year and paid for more than one-half of the expenses necessary to maintain his household. Ironically, even though the appellant also shared his income with his ex-spouse during the first three months of 1992, respondent would impose an even more egregious tax burden on the appellant than would result if the ex-spouse never resided in the same household.[6] Such a conclusion makes little sense in light of the stated purpose of the law. For that reason, we believe that appellant, as well as similarly situated taxpayers seeking to qualify under section 2(b), merit some relief from respondent's interpretation of the head of household statutes.

[6]Such a sharing of income is implicit based on the community property laws in California.

In recognizing the need for some relief for a taxpayer in appellant's circumstances, we must also recognize the need to balance the income sharing rationale of the statute against the competing policy goal of granting tax relief to those taxpayers who are single parents. For that reason, we are not willing to grant appellant credit for the entire time during which he and his ex-spouse shared the household. Rather, consistent with the general principles of the community property laws in this state, we will allow credit for one half of the time during which the ex-spouse and the children reside in the same household. Such an approach modifies the extreme interpretation proposed by the respondent, but allows the taxpayer responsible for the children's welfare an opportunity obtain some tax benefit as envisioned by the legislature. Any other approach is unfair and fails to recognize such a taxpayer's unique circumstances.

Our decision to split the difference for purposes of the head of household determination is not without precedent. In the case of Abrams v. Commissioner (1989) ¶ 89,462 T.C.M. (P-H), the tax court effectively allowed one half credit to each spouse for expenses incurred by the husband and wife during the existence of the marital community. The Abrams court apparently felt bound to such an outcome due to the community property laws of the taxpayer's home state. While recognizing that the Abrams decision is not perfectly analogous to the instant case because it concerned a division of money rather than time, both outcomes are similar in that they are forced by the lack of clear statutory guidance in this area. As in the Abrams case, it would simply be unfair to deny some recognition of the events which occurred while appellant lived with his ex-spouse.

Based on the aforementioned reasoning, we hereby grant appellant's claim for refund.

Done at Sacramento, California, this 10th day of September, 1997, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Andal, Mr. Klehs, Mr. Halverson* and Mr. Chiang** present.

Ernest J. Dronenburg, Jr., Chairman

Dean F. Andal , Member

Johan Klehs , Member

Rex Halverson* , Member

John Chiang** , Member

*For Kathleen Connell, per Government Code section 7.9.
**Acting Member, 4th District.